

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KATHLEEN BROWN,
Plaintiff

v. CIVIL ACTION NO. 03-224 ERIE

COST COMPANY,
Defendant

JURY TRIAL - DAY NO. 1

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Judge's Chambers & Courtroom A,
United States Courthouse, Erie, Pennsylvania,
on Monday, June 6, 2005.

APPEARANCES:

RICHARD S. MATESIC, Esquire, appearing on behalf
of the Plaintiff.

MICHAEL J. PAWK, Esquire, and LAWRENCE P. LUTZ,
Esquire, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 8:40 a.m., on

4 Monday, June 6, 2005, in Judge's Chambers.)

5

6 THE COURT: All right, rather than look at the
7 motions in limine, let's look at the proposed voir dire. And
8 we'll start, I'll start with the plaintiff's proposed voir dire
9 here. I'll run through them and kind of indicate my feelings
10 on them. If the defendant, when I'm doing that, and
11 vice-versa, has any strong feelings, pipe up, I will construe
12 silence as acquiescence.

13 We're going to come back to the issue on whether
14 Franco gets in this case at all is still on the table.

15 Two we'll give.

16 I will reluctantly give three, we'll be here until
17 the cows come home. Do you really want me to do that, Mr.
18 Matesic, or maybe sharpen it up a little bit?

19 MR. MATESIC: Of course, I think the court
20 understands the thrust of it, the thrust of the question.

21 THE COURT: I think it's somewhat duplicative of
22 four. We'll give four rather than three.

23 MR. MATESIC: Okay.

24 THE COURT: Five, we'll give five.

25 We'll give six.

1 What's the deal on seven, the labor union is only
2 tangentially involved here?

3 MR. MATESIC: That's correct. The fact is if
4 Kathleen were to have been employed by Cost, she would have
5 become a member of the labor union.

6 THE COURT: I just don't see it being relevant.

7 Eight, we're not going to give.

8 We'll give 9 and 10.

9 We'll give 11.

10 Do you have a witness list?

11 THE CLERK: I provided counsel both lists of
12 witnesses. That list of witnesses appears in the pretrial
13 statements. I explained if there are any names you know you're
14 not going to call, scratch them off.

15 THE COURT: Thirteen I'm not going to give.

16 Fourteen I'm not going to give.

17 Fifteen I'm not giving.

18 Sixteen we'll give.

19 Seventeen I'm not going to give.

20 Eighteen I'm not going to give.

21 Nineteen we'll give.

22 Twenty-one we'll give.

23 Twenty-two and twenty-three we'll give.

24 Twenty-four we're not going to give.

25 Twenty-five we're not going to give.

5

1 Twenty-six -- let me go back and look at 25. I

2 think we'll give 25.

3 Twenty-six we'll give.

4 Twenty-seven is duplicative, we're not going to give

5 it.

6 Twenty-eight -- as a general across the board

7 proposition, I don't give voir dire on broad, philosophical

8 questions that require juries to reflect ad nauseam.

9 Twenty-nine --

10 MR. PAWK: I think that was asked earlier.

11 MR. MATESIC: I'm sorry, it's duplicative.

12 THE COURT: Twenty-eight I'm not going to give.

13 Twenty-nine I'm not giving. Okay, now the defendants. Some of

14 these are going to be in the standard voir dire. One is given.

15 Two is given.

16 Three is given.

17 What's the relevance of their unemployment,

18 everybody has been unemployed at some point?

19 MR. PAWK: That's okay, judge.

20 THE COURT: Four is out. I'm not going to go

21 through the last five jobs they've held. They will be asked

22 what their present occupation is.

23 Educational background. Six is all right.

24 Seven is in the standard anyway.

25 Is eight in the standard?

6

1 THE CLERK: Yes, judge.

2 THE COURT: I think nine is probably duplicative of

3 one of the plaintiff's, so we won't give it.

4 Have you ever managed employees -- didn't you ask

5 something about that, Mr. Matesic?

6 MR. MATESIC: I don't think so, your Honor.

7 THE COURT: Ten we'll give.

8 Eleven we'll give.

9 Twelve should be somewhat apparent from what their

10 occupation is. Workforce, current status, we're not going to
11 go there. We're not going to give 12.

12 Thirteen, I presume, is just to find out if they can
13 serve. I think what we'll ask them is this case is expect to
14 last -- how long did you tell me, five days?

15 MR. MATESIC: At the most.

16 THE COURT: Approximately four days. Is there any
17 reason that any of you could not serve for that period of time.

18 MR. PAWK: I think 14 is suppose to go with 15.

19 THE COURT: By the way, in terms of what the case is
20 about, this is what would I propose we say. Jot this down.
21 In this case the plaintiff, Kathleen Brown, claims that the
22 defendant, Cost Company, discriminated against her on the basis
23 of her gender when it failed to hire her, or when defendant
24 failed to hire her as an employee -- what's the operative date
25 here, August of?

1 MR. MATESIC: July 31st.

2 THE COURT: July 31, 2002.

3 MR. MATESIC: Actually on and after.

4 THE COURT: On and after July 31, 2002. She seeks
5 damages as a result of that alleged discrimination. Defendant
6 denies that its failure to hire the plaintiff was based upon
7 her gender and contends that it is not liable to the plaintiff
8 for any claimed damages. Is that acceptable to everybody?

9 MR. PAWK: Yes.

10 MR. MATESIC: Acceptable here.

11 THE COURT: All right. Is fifteen duplicative of
12 anything you have, Mr. Matesic?

13 MR. MATESIC: We didn't ask specifically about any
14 discrimination.

15 THE COURT: All right, we'll give 15. Then here's a
16 list of witnesses which you guys can refine. Or parties or
17 people that they might know.

18 Seventeen we'll give.

19 Eighteen we're not going to give.

20 Nineteen we're not going to give.

21 We're not going to give twenty, what is your opinion
22 of those rules. We're not going to give any of it.

23 Twenty-one we'll give.

24 Twenty-two is duplicative, there's already a

25 question about filing of gender complaints.

8

1 We're not going to give twenty-two.

2 We're not going to give twenty-three.

3 We're not going to give twenty-four and its

4 subparts. Because if I start asking about serious disputes,

5 I'll be into my next trial in 2008. What they perceive to be

6 one.

7 I'm not going to give twenty-five.

8 We're not going to give twenty-six.

9 Twenty-seven, to the extent it wasn't already asked

10 with Mr. Matesic, we'll give it.

11 Twenty-eight we're not giving.

12 Twenty-nine we're not giving.

13 Thirty we're not giving.

14 Thirty-one we're not giving.

15 Thirty-two we'll give.

16 Thirty-three we're not giving.

17 Thirty-four we're not giving.

18 Thirty-five we're not giving.

19 Thirty-six is duplicative.

20 Thirty-seven we're not giving.

21 Thirty-eight we're not giving.

22 Thirty-nine we're not giving.

23 MR. MATESIC: I have to object to forty.

24 THE COURT: I'm not giving it.

25 Forty-one we're not giving.

9

1 Forty-two we're not giving.

2 Incidentally, I find those argumentative, just for
3 the record, that's why I'm not giving them.

4 Forty-three we're not giving.

5 Forty-four we're not giving.

6 Forty-five, it doesn't matter what it means to them,
7 it's what I tell them it will mean, we're not giving it.

8 Forty-six we'll give.

9 Forty-seven we'll give.

10 Forty-eight we'll give.

11 I think forty-nine is asked, is there any reason you
12 can't decide this case fairly.

13 Forty-nine is duplicative.

14 Right there, fifty. We'll give fifty, we won't give
15 forty-nine.

16 The case is expected to last -- we'll say, we'll
17 change that to be on the safe side, five days. And that
18 subsumes your question, Mr. Matesic.

19 THE COURT: Fifty-two we're not going to give. If
20 somebody has a problem, they'll let us know. All right.

21 THE CLERK: Judge, how many jurors are we going to
22 seat?

23 THE COURT: My practice is, unless there is some
24 strong objection, to seat eight jurors, I generally do that.
25 Technically, there are two alternates, my feeling is they sat

10

1 through the trial, they ought to be able to deliberate as well.

2 Anybody have any problem with that?

3 MR. MATESIC: No.

4 MR. PAWK: No, judge.

5 THE COURT: All right.

6 THE CLERK: How many strikes, judge?

7 THE COURT: What did you do the last time?

8 THE CLERK: Three.

9 THE COURT: My preference is three strikes. Let's
10 then turn to the motions in limine. You didn't have any
11 motions?

12 MR. MATESIC: Did not.

13 THE COURT: We're going to take up the defendant's
14 motion in limine. Let's start with this Franco business. And
15 you're asking that there be no reference to Franco or
16 development of this alleged, this other company that some of
17 the principals are involved in?

18 MR. PAWK: Correct. Judge, the reason being is in
19 plaintiff's motion, brief in opposition to defendant's motion
20 for summary judgment, he brought in an outside newspaper
21 article from the Pittsburgh Post Gazette regarding Franco,
22 regarding some work they did at stadiums in Pittsburgh. Franco
23 is a partnership owned by Rebecca Snyder and her mother,
24 Frances Cost. Cost Company is a different company. Cost
25 Company is the defendant in this lawsuit. I submit to you if

1 we're going to get into, what I think the plaintiff wants to do
2 is get into Cost Company and discriminatory practices and all
3 of a sudden shift over into Franco and somehow tie that into
4 Cost, we're going to be trying this case --

5 THE COURT: Maybe the thing to do is sharpen our
6 discussion. First, you have to tell me why it's relevant, then
7 I'm going to have him discuss it, too. To frame the issue,
8 having read your papers last night, as I understand it, you
9 think that an exploration of Franco insofar as it might inform
10 the jury concerning Franco's hiring practices and knowledge of
11 equal employment laws, particularly insofar as they are
12 participants in that federal program, what's the name of it?

13 MR. MATESIC: They're disadvantaged business
14 enterprises regulations in general apply to the contracting
15 money that Franco is eligible as a women owned business.

16 THE COURT: In any event, what do you want to tell
17 me -- my understanding is that you think the evidence
18 concerning Franco may be relevant on the issue of the mens rea
19 of the Cost employer under the Kolstad case, is that right?

20 MR. MATESIC: Right.

21 THE COURT: I'm having a hard time figuring it out.

22 MR. MATESIC: Just in general our contention is that

23 Franco and Cost are one in the same entity. Ms. Pawk, when she
24 testified without any prompting by plaintiff's counsel, talked
25 about Franco as if it was the same as Cost. In fact, there is

12

1 an overlap between the two companies. Ms. Pawk works for both
2 of them. They share employees. They share projects. Both
3 entities ties are owned by the Cost family. It's our belief
4 that Franco, I should say it differently, it's our belief that
5 Cost predated Franco. That Franco is a relatively recent
6 creation that was put together specifically for one purpose.
7 To go out to go after these dollars specially earmarked for
8 women owned businesses.

9 THE COURT: How does the program work; in other
10 words, you receive federal funding in return for making
11 affirmative efforts to be more inclusive to various minorities,
12 is that right?

13 MR. MATESIC: Actually, there's two different facets
14 of the program. Maybe it's easier to begin with the
15 non-disadvantaged garden-variety businesses. If you have such

16 a business and you want to work on public projects that are
17 federally funded and oftentimes is the case with state funding
18 and local government funding projects as well. You have to
19 show that you're committed to the goal of equal employment.
20 Now, the federal rules require that you do one of two things.
21 And, again, this is just for the non-disadvantaged.

22 THE COURT: Like Cost?

23 MR. MATESIC: This would be like Cost. You have to
24 either show that you hit these targets for women hiring and
25 minority hiring. 6.9 percent for females. 6.3 percent for

13

1 minorities. You have to show that as a condition to keeping
2 the money that you get as a contractor. If you don't show
3 that, you have one affirmative defense. And that is that you
4 have followed this 16 step procedure --

5 THE COURT: I made good faith efforts?

6 MR. MATESIC: You made good faith efforts. Ms. Pawk
7 testified about good faith efforts that Cost goes through.
8 That they never hit these targets, at least in terms of
9 women -- they never hit the target of 6.3 percent. If you are,

10 on the other hand, a women owned enterprise, you are under the
11 law considered to be a disadvantaged business enterprise. Now,
12 there's a whole different set of contracts, a whole different
13 type of money only the disadvantaged business enterprises are
14 eligible to receive. Cost can't get that money. But Franco
15 can. Our contention is that Franco really is a creation of
16 Charles Cost, the same person who owns Cost Company, and the
17 same person who would ultimately be held liable in the event
18 that Kathleen prevails in the case. The creation of Franco
19 indicates this mens rea of the same decision-maker involved in
20 the case, who we also contend does not have communication to
21 his lower-level employees you must diligently pursue this goal
22 of equal employment. Dean Taylor, foreman, you must hire women
23 when they come to the job site, you can't simply show them the
24 door or discriminate against them. Ms. Pawk also testified
25 that, and I'm going back now to Cost, that she would kill, and

14

1 this is her own language, she would kill --

2 THE COURT: Figuratively, no doubt?

3 MR. MATESIC: Right, let's use that metaphor. I

4 think they would be dying to tell the jury if in fact Cost had

5 met these targets of 6.3 percent and 6.9 percent hiring, and

6 she can't do that.

7 THE COURT: I'll tell you tentatively where I'm

8 going. First off, this is not a disparate impact case. This

9 is a disparate treatment case. I would no more be inclined to

10 let the defendant, by way of defending itself, come in and say

11 I met this hiring goal or I met that hiring goal, than I'm

12 going to let you attempt to use their failure to meet those

13 goals as evidence of discrimination in this case.

14 MR. MATESIC: Not that it's evidence of

15 discrimination in this case, it's evidence of the disregard or

16 reckless indifference for federally protected rights. If the

17 same decision-maker on the one hand is saying we are totally

18 committed to equal employment, we would kill to have female

19 employees in the workforce, that if the same employer when

20 confronted with written applications from a female saying give

21 me an opening as a laborer as soon as you have one, that same

22 employee just rips that up or whatever they do, if they just

23 ignore that application, that undermines the earlier statement

24 that they would kill, that they are really diligently committed

25 to hiring females. So it goes to state of mind.

1 THE COURT: Let me ask you a couple factual
2 questions here, then I'll hear what defense counsel has to say.
3 Who was the man who interviewed, who was the front line person
4 who first met your client on or about July 31st and indicated
5 that they didn't have any positions?

6 MR. MATESIC: Dean Taylor.

7 THE COURT: And here's the all important question
8 under Kolstad or one of them, was he the manager, did he

9 function in a managerial capacity?

10 MR. MATESIC: Yes.

11 THE COURT: What was his position?

12 MR. MATESIC: He was the foreman of that job site.
13 So in his own words he ran the job, he hired all of the
14 employees, he supervised or coordinated delivery of materials
15 to that job site. There is one other thing, I can't remember
16 what it is. He did all the hiring since April, 2002 when he
17 arrived on that job until it was completed, I don't know if it
18 was a year later, Mr. Taylor was the hiring authority.

19 THE COURT: All right. Before I spin over here,
20 now, let's focus on what I think the standard here is. I read
21 this Kolstad case, I hadn't looked at it in a long time, to
22 make a long story short, the court was struggling with the
23 concept of vicarious liability under Title VII insofar as it
24 applies to punitive damages. And they looked at the common law
25 and restatement. And, essentially, I guess the holding of the

16

1 case would be this. They said recognizing Title VII as an
2 effort to promote prevention of -- well, as remediation and
3 absorb the very principles underlying the restatement's strict
4 limits on vicarious liability for punitive damages, we agree
5 that in the punitive damage context an employer may not be
6 vicariously liable for discriminatory employment decisions of
7 managerial agents where these decisions are contrary to the
8 employer's good faith efforts to comply with Title VII. And,
9 by the way, the type of recklessness or evil motive that is
10 afoot there is something more than just being gender
11 discriminatory. You have to know what the law is, it is a
12 reckless indifference to the dictates of federal law. And in

13 Kolstad they sent it back to determine whether he was

14 receiving, for instance, in a managerial capacity, whether the
15 association had been making "good faith efforts" to enforce an
16 anti-discrimination policy. So that's the legal backdrop here.
17 Now, in response to what Mr. Matesic said, what is your
18 position?

19 MR. PAWK: I don't know how that applies to Franco
20 at all. If you're talking about that case, Kolstad, that seems

21 to apply to Cost with respect to punitive damages based on
22 maybe if she shows there was some kind of reckless indifference
23 on Dean Taylor's part in terms of hiring.

24 THE COURT: The way I see this playing out is this,
25 and then we're going on to the other points, I'm going to rule

17

1 on this all at once. You don't question his managerial status,
2 do you?

3 MR. PAWK: He's a foreman. Judge, there's going to
4 be testimony that Georgia Pawk, who is the EEO officer and
5 president of Cost Company, judge, the facts are going to come

6 out like this. That Kathleen Brown, she's testified at her
7 deposition that she didn't expect necessarily to get hired on
8 July 31st or August 23rd. That she wanted to get hired on
9 those days or sometime later with Cost Company. And there's a
10 continuing dialogue between her and Georgia Pawk in the fall of
11 2002, who is the EEO officer and president of the company, and
12 the testimony will show that they attempted to hire her, when
13 we're talking about hiring her, she didn't have her
14 certification as an operating engineer. My problem with Franco
15 is this. Franco gets inserted into the case, I'm going to
16 bring Rebecca Snyder up from Pittsburgh, she's the managing
17 partner of Franco. Testifying about all the certifications
18 she's gone through in Harrisburg. We're going to be here,
19 instead of five days, we're going to be here 10 days --

20 THE COURT: Length of time is never determinative as
21 to whether something is relevant.

22 MR. PAWK: It's confusing for the jury. Under the
23 Federal Rules of Civil Procedure, especially 403, 401, I don't
24 believe it's relevant. It's going to be confusing.

25 THE COURT: Let me ask you a question. On Cost, are

1 they required, I don't mean on Cost, on Franco as a participant
2 in the program, a federal program, are they required to
3 maintain a certain percentage of minorities?

4 MR. MATESIC: I believe that's the case, I haven't
5 actually investigated that.

6 THE COURT: Do you know about Franco as a
7 participant in a federal funding program?

8 MR. PAWK: I think the same discrimination rules
9 apply to them as does Cost. I don't think that's different.
10 It's more ownership.

11 THE COURT: As long as you make good faith efforts.

12 MR. MATESIC: Judge, as we said on page eight of the
13 memorandum, the regulations, which set out 16 good faith steps,
14 instruct contractors like Franco and like Cost, an affirmative
15 action program is just more than a paperwork exercise. The
16 whole intent of the program is to increase female participation
17 in the workforce. Chronically, as we go year after year, Cost
18 never meets those numbers, Franco never meets those numbers,
19 then that suggests that they treating this like a paperwork
20 exercise, that's a violation of the regulations.

21 THE COURT: Let's talk about the other aspect of the

22 motion in limine.

23 MR. PAWK: If I could just respond to that, judge.

24 THE COURT: Yes.

25 MR. PAWK: The testimony will be from Cost and its

19

1 employees, all of the efforts, they'll detail the efforts that

2 they go through with those 16 steps, okay.

3 THE COURT: Cost?

4 MR. PAWK: Cost, yes. And in great detail how they

5 try it. It's very difficult in the industry to get women to

6 work in this business.

7 THE COURT: I take it that your efforts to come,

8 your efforts to push each button on the 15 steps in an effort

9 to get women will in part be your good faith defense, would be

10 your good faith defense to a claim of punitive damages; in

11 other words, even if you were liable, under Kolstad you would

12 argue -- put it this way. Obviously, you're not taking the

13 position that Cost, through its managerial employees and

14 supervisory folks, were ignorant of the federal

15 anti-discrimination laws, quite contrary?

16 MR. PAWK: No, they have a very detailed program to
17 comply with.

18 THE COURT: Further, unlike some rare situations
19 that Kolstad says that could develop where you think you aren't

20 discriminating by doing something or think it's in compliance,
21 that's not one of these cases, that's not the thrust of your
22 defense, there wasn't any work available as a factual matter,
23 right?

24 MR. PAWK: That's one of the defenses.

25 THE COURT: And so to flush it out, then, if the

20

1 case were going to the jury on the issue of punitive damages,
2 your defense liability and punitive damages, your defense as an
3 employer to defeat the imposition of punitives is coming
4 from -- what's the guy's name?

5 MR. MATESIC: Taylor.

6 THE COURT: Taylor, would be the employer's good
7 faith?

8 MR. PAWK: That's true, judge. We also think there

9 are many components to the defense --

10 THE COURT: They're mixed together. I just want to

11 get the lay of the land. Let's go to these damages. Let me

12 ask you, Mr. Matesic, what is, first of all, I'm hard pressed

13 to figure out what your front pay claim is, given what she's

14 done?

15 MR. MATESIC: She's entitled to the rate that was in

16 place at SCIM, \$10.94 an hour contribution pension. Over and

17 above the \$17 and change they earned per hour. Now, as an

18 operator she's making less that.

19 THE COURT: Who is she working for now?

20 MR. MATESIC: Trumbull.

21 THE COURT: What is her hourly rate?

22 MR. MATESIC: About the same. She's getting 50

23 cents an hour less in contribution.

24 THE COURT: Really the only future economic claim is

25 not under wage, it's pension contribution, is that right?

1 MR. MATESIC: Correct.

2 THE COURT: And what about your back lost wages?

3 MR. MATESIC: You want a total number?

4 THE COURT: In theory.

5 MR. MATESIC: We're going from July 31st, when we
6 contend there was an opening, until April 13th, when she got on
7 with Trumbull, I believe April 13th.

8 THE COURT: Of?

9 MR. MATESIC: Of 2003.

10 THE COURT: Okay. So you don't have a dispute about
11 that period of time?

12 MR. PAWK: Yes, we do. She took a job in November
13 of 2002.

14 THE COURT: With who?

15 MR. PAWK: KGL.

16 THE COURT: Was that at a lower hourly rate than
17 what she would have been making before?

18 MR. MATESIC: \$15 an hour.

19 MR. PAWK: They have a constructive discharge from
20 KGL.

21 THE COURT: That's not my case.

22 MR. MATESIC: They offered her room and board. And
23 when she got there -- it was a house with two other employees

24 of KGL who were boyfriend and girlfriend. There were domestic
25 instances in the house, she asked for alternative housing.

22

1 They said, to use the curse words, we're not your fucking
2 babysitter, you like it or leave. So she left, that was it.
3 It lasted all of a month.

4 THE COURT: Whatever, the fact of the matter is --
5 that's your wage claim. Now, why, given it's not really a
6 front pay claim as a pension contribution claim and lost wages,
7 why for heavens sake would you need expert testimony for any of
8 that?

9 MR. PAWK: I was basing it on what he filed in his
10 pretrial statement, judge. He had future health benefits,
11 future pension benefits, that is something that an economist
12 would need to come in and express. It's more akin to opinion
13 testimony, that's why I filed that.

14 THE COURT: All right. I want to digest this a
15 little bit, we'll get back together on the record and I'll rule
16 on this.

17 MR. PAWK: Judge, before we start with the jury, I

18 wanted to address an issue because I might want to talk about
19 it in my opening. As you know, Kathleen Brown filed an EEO
20 complaint against Cost Company in December, 2002. By March of
21 2003 and April of 2003, there was ongoing dialogue with
22 Kathleen about hiring her. In addition to the dialogue that
23 occurred before. An offer of employment was made to her for a
24 laborer's job, the exact job she complains about today. They
25 didn't hire her for the job that she said she would have taken

23

1 then or in the future. I would like to mention that, I just
2 wanted a clarification on that. I think it's relevant for a
3 number of reasons.

4 THE COURT: Was this during the pendency of the
5 case?

6 MR. PAWK: The EEOC claim.

7 THE COURT: Why would you want to mention that, from
8 your standpoint?

9 MR. PAWK: Because it's the third EEOC complaint
10 filed within a year and half, first of all. Second, we don't
11 believe that the evidence will show that there was

12 discrimination. They were willing to hire her at that point.

13 THE COURT: Was she already working at the time she
14 was offered that job?

15 MR. MATESIC: She had been give an offer from
16 Trumbull.

17 MR. PAWK: She said in deposition she was employed
18 at that time but she was having dialogue with Trumbull.

19 THE COURT: Tell me again what the relevance of it
20 is?

21 MR. PAWK: It's relevant because the same job they
22 complain about here today, I submit --

23 THE COURT: Laborer job?

24 MR. PAWK: She couldn't be hired as an operator,
25 they backed off that. They complain they should have hired her

24

1 for a laborer's job. The very job she complains then we offer
2 her, it's in her diary, judge, she writes Cost offered her a
3 shit laborer's job (not), it's in her diary.

4 THE COURT: What is it probative of?

5 MR. LUTZ: The fact she was looking for an

6 operator's job with Cost, not this laborer's job that they say
7 she was denied. And Georgia Pawk's testimony is going to be
8 yeah, I had an ongoing discussion with her about an operator's
9 job, I finally find out after, this is in the EEO claim file,
10 she wants a laborer's job then.

11 THE COURT: Are you saying that the relevance of the
12 subsequent request -- why would you offer her a laborer's job?

13 MR. LUTZ: She finally said after the EEOC
14 proceedings that she wanted a laborer's job, we said okay.
15 That's the first time we were aware of this was after.

16 MR. MATESIC: I don't really have a problem with it,
17 I thought it was going to come up anyway.

18 MR. LUTZ: The other thing is it goes to damages,
19 too, that cuts off any future thing from that point onward.

20 THE COURT: Do you mean on pension?

21 MR. LUTZ: There is a claim for future pension, how
22 can they make that claim when she received this offer.

23 THE COURT: What about that, that does strike me as
24 somewhat potentially accurate?

25 MR. MATESIC: The problem is that she never would

1 have been put in the position of having to make what was
2 charitably speaking a Hobson's choice. If she had been hired
3 by Cost and become a laborer then back in July of 2002, she
4 could have advanced to some other position since July of 2002.
5 Cost had mistreated her. She was forced to give up her career
6 with Cost in exchange for Trumbull. Anybody who would be
7 mishandled the way she was by Cost would be reluctant to take
8 any employment with Cost.

9 THE COURT: In any event, you don't have an
10 objection to it coming in, you can argue for what you think
11 it's worth.

12 MR. LUTZ: Before we move from that, your Honor, I
13 think it goes to ruling on our motion in limine with respect to
14 the amount of damages that can come in. Because if she
15 receives this offer, I don't think --

16 THE COURT: Do you mean as a matter of fact?

17 MR. LUTZ: As a matter of fact she should not be
18 able to put this evidence in. On those benefits from that day
19 onward.

20 THE COURT: Do you dispute that an offer was made as

21 a factual matter?

22 MR. MATESIC: I don't dispute that. But I what do
23 insist is that she was looking for work on July of 2002, for
24 which she would have been paid more than \$17 an hour, plus the
25 pension benefits. They said no, she went back a month later.

26

1 They said no again. She had complained, they still said no.
2 By the time they called her in April, come work for us, what
3 would any reasonable person in Kathleen Brown's position do if
4 Trumbull was offering her a job at a slightly smaller
5 compensation rate. Trumbull is at least an unknown quantity.
6 But Trumbull hasn't jerked her around like Cost.

7 THE COURT: You're saying it's a reverse
8 constructive discharge, where an employee is reluctant to be
9 employed by an employer for whom she allegedly believes is
10 discriminatory?

11 MR. MATESIC: Correct. I think conceptually that's
12 exactly the point.

13 THE COURT: I don't have to rule on this right now,
14 I can rule on it at any point during the case, it will be in or

15 it will be out.

16 Now, I'm not sure how this cuts or if it's relevant,
17 but it has to be brought out, the jury may draw their own
18 conclusions. To state the obvious, you're married to one of
19 the principals here. And I was just reflecting on what if any
20 problems that creates. Does anybody have any thoughts on that;
21 I'm inclined to think it doesn't really, but --

22 MR. MATESIC: I don't think it does, either.

23 MR. LUTZ: I'm here to handle the witness.

24 THE COURT: I think that really takes care of it.

25 MR. PAWK: We talked about that at one of the

27

1 pretrial meetings.

2 THE COURT: All right. I'm going to look at this
3 stuff, I'll get a ruling on the record. Any witness problems,
4 everybody got their witnesses lined up, we're ready to go?

5 MR. PAWK: I have Dean Taylor and William Heaton
6 here today. I don't know if you'll get through Kathleen and
7 Dean today. William Heaton is here if you do.

8 THE COURT: Here's a question that dawned on me,

9 occurred to me. And this is how this case ultimately would be

10 presented to the jury by way of instructions. Is this the

11 McDonnell_Douglas classic burden shifting case?

12 MR. MATESIC: Yes.

13 THE COURT: I view it this way, the standard prima

14 facie -- put it this way. I think the prima facie case will be

15 met as a matter of law. And the issue is going to be the

16 stated legitimate reason and whether or not the plaintiff can

17 demonstrate by a preponderance of the evidence that it was --

18 MR. MATESIC: Correct.

19 MR. PAWK: Just for the record, I don't believe

20 McDonnell_Douglas will be met, I think it's the kind of case --

21 THE COURT: I'm not saying it will be, I need to

22 construct, because there was some suggestion of a direct

23 evidence case. You know what at some point they kind of blend

24 together, it's confusing to try to charge on direct evidence.

25 And there's going to be here alleged testimony, from what you

1 say, the guy said, he can say what he wants, that all molds

2 into I think the pretext aspect.

3 MR. MATESIC: Can we revisit that with regard to the
4 final charge, judge?

5 THE COURT: To see if the evidence comes in. I'm
6 viewing this right now as a garden variety Fuentes case in
7 terms of instruction.

8 MR. MATESIC: Speaking of the final charge, judge,
9 what is your practice in terms of when you give that, the final
10 charge instructions on the law, does that come before or after
11 the closing statements?

12 THE COURT: Do you mean the final charge to the
13 jury?

14 MR. MATESIC: The final charge to the jury.

15 THE COURT: After closing arguments. What we do is
16 make that available to counsel in written form before closing.
17 As a matter of fact, what we do is we'll look at the points for
18 charge. A lot of these are boilerplate, there's not much
19 dispute, from my experience, in a Title VII, particularly a
20 case like that. We will have a complete charge prepared, 18,
21 19, 20 pages, I don't know how long my standard charge is in a
22 Title VII case. You'll then have an opportunity to read and

23 review it, then we'll have a charge conference where you can
24 say this shouldn't be in there, this should, you didn't cover
25 one of mine adequately. You'll have an opportunity to make any

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1 objections on the record before I do my charge.

2 MR. MATESIC: The reason I'm asking about this is if
3 the points for charge are in the final version at a time just
4 prior to the closing arguments, is it appropriate for counsel
5 to refer to any part of that closing charge?

6 THE COURT: I don't usually jump up and down about
7 that. What I find permissible and I rarely seen evince an
8 objection, where counsel simply will, to the extent necessary
9 they feel it should be delineated into their closing, read it
10 verbatim what I'm going to tell the jury, but not make any
11 independent interpretation of what it is. I don't want the
12 jurors thinking that lawyers who are telling them what the law
13 is beyond just reading what they know they're already going to
14 be told. So yeah, you can do that.

15 MR. LUTZ: With these screens we have available in
16 the courtroom, is it permissible to put that on the screen?

17 THE COURT: I don't have a problem with that. That

18 assumes the screens over there are working. How long is your
19 opening?

20 MR. PAWK: Fifteen, 20 minutes.

21 MR. MATESIC: About the same here.

22 THE COURT: All right, I'll get you back in here in
23 a little bit and I'll rule on these things.

24 (Recess from 9:29 a.m.; until 9:40 a.m.)

25 THE COURT: All right, this is an order.

30

1 ORDER

2 Presently pending before the court is Cost Company's
3 motion in limine. For the reasons discussed more fully on the
4 record, the defendant moves to prevent the plaintiff from
5 introducing evidence concerning Franco Associates.
6 Essentially, defendant contends that evidence is irrelevant
7 and/or alternatively its prejudicial effect outweighs its
8 probative force. Plaintiff on the other hand contends that the
9 evidence concerning Franco is relevant in light of the United
10 States Supreme Court case of Kolstad v. American Dental

11 Association, 527 U.S. 526. As discussed more fully at the

12 argument on the motion in limine, that case stands for the
13 proposition that where a managerial employee engaging in
14 discriminatory conduct in a Title VII case, punitive damages
15 are not an act with reckless malice or reckless indifference
16 described in this case, an employer is not automatically
17 vicariously liable and may defend on the basis of its own
18 independent good faith efforts to prevent discrimination in its
19 workplace.

20 Having carefully considered the matter, I find the
21 proposed evidence concerning Franco Associates involving
22 statistics and the amount of people, that is minorities have
23 been hired, etc., irrelevant to this action. Even if it had
24 some marginal relevance, it would require -- an entirely
25 separate evidentiary road, taking us far away from this case.

1 The question of the company's reckless indifference to Cost
2 Company reckless difference to the plaintiff's rights can be
3 squarely put before this jury relative to Cost's management

4 actions. In so doing, once the plaintiff does that, under

5 Kolstad the defendant will have an opportunity to attempt to

6 demonstrate to the jury its independent good faith. So that's

7 the ruling on that.

8 Insofar as the question of the back pay is

9 concerned, I think there has been an essential agreement

10 between counsel as to how that evidence or testimony is going

11 to be permitted to come in, is there not?

12 MR. MATESIC: I believe.

13 THE COURT: The back pay issue -- in other words,

14 the fact that she obtained that other position at a lower rate

15 doesn't necessarily cut-off her back pay, it would represent a

16 diminution in her back pay which you would be entitled to argue

17 to the jury.

18 MR. PAWK: That would be on the November job she

19 took. I don't think there's an agreement necessarily on the

20 job she took in April, are you talking about front pay or back

21 pay?

22 THE COURT: Back pay right now.

23 MR. PAWK: I understand.

24 THE COURT: Then the front pay issue -- the only

25 thing that is arguably left on front pay is the question of

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1 pension benefits. However, the pure legal issue is whether or
2 not a party would be entitled to claim future pension, the
3 diminution of future pension benefits, whereas, as a matter of
4 fact they had been offered the same position by the defendant,
5 albeit at a later point in time. The plaintiff contends that
6 the offering of the position should not necessarily preclude a
7 recovery of pension benefits because under the circumstances
8 and based upon what the plaintiff knew about the company, she
9 would have been justified in refusing the employment.
10 Defendant on the other hand contends it is an absolute bar to
11 future claims. Intuitively, my sense of it is that this should
12 be treated in somewhat the same fashion as a constructive
13 discharge case. And that it will be an issue for the jury as
14 to whether the plaintiff's refusal to have accepted that offer
15 of employment under all the circumstances was reasonable. And
16 when I say reasonable, I think it should be judged by the same
17 constructive discharge standards that would determine whether
18 someone's leaving an employment was reasonable under the

19 circumstances. So it's a fairly high hill to climb. With that

20 qualification on front pay, it may end up going to the jury,

21 but it depends on their factual finding on that. Does

22 everybody understand that?

23 MR. MATESIC: Yes, your Honor.

24 MR. PAWK: Yes.

25 MR. LUTZ: Yes.

33

1 MR. MATESIC: One more thing, judge, before we

2 conclude. I'm sorry I didn't bring this up the last time, the

3 defendant has moved to amend their pretrial statement to

4 include a list of names of female employees, I believe of Cost

5 and Franco. As one piece of evidence demonstrating their good

6 faith compliance with the regulations. That list does not have

7 any dates on it whatsoever. And there's nothing to indicate to

8 the jury or any reasonable person reading that document when

9 those persons were in fact employed. We believe that this is

10 not going to be probative at all, it's going simply going to

11 confuse the jury because --

12 THE COURT: What is this list?

13 MR. PAWK: Maybe to address that, I have to take a
14 closer look at that, I may not even present it. My thought is
15 this. Maybe we can address it if we intend to try to use it as
16 an exhibit, but I don't believe I will.

17 THE COURT: I can make it easy for you, one, it's
18 irrelevant. Just for the same reasons that I felt an attempt
19 to introduce statistical meeting bench marks is irrelevant.
20 The number of women that you have on your workforce is
21 irrelevant for purposes of attempting to rebut discriminatory
22 animus in the case. Furthermore, to the extent it involved
23 names of people in Franco, if you introduce that, I would have
24 to revisit the whole issue on this Franco thing. It's not
25 coming in. That should make it easier.

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1 MR. MATESIC: I would like to note my objection to
2 the court's ruling on the Franco evidence. As a point of
3 clarification, the Franco evidence, I'm sorry if there was a
4 misunderstanding on your part, but we did not seek to include
5 primarily because of its statistical work -- we did seek to
6 admit it primarily because we believe the decision to create an

7 entity specifically for purposes of taking federal money for
8 disadvantaged business enterprises, that decision was made by
9 the same person who owns Cost Company. It goes to the mens rea
10 element under Kohlstad.

11 THE COURT: Basically, if someone is reading this
12 record at a future point in time i.e., the Third Circuit, to
13 make it clear, what you're really suggesting is that the other
14 company was set up as a sham, isn't that right, a scam, let's
15 put it that way?

16 MR. MATESIC: Yes.

17 THE COURT: For that reason, also, that's a
18 different battle for a different day. But I just don't see
19 that it's relevant. I think it would poison the atmosphere
20 here. But your objection is noted. All right.

21 (Whereupon, at 9:50 a.m., proceedings recessed in
22 Judge's Chambers; and at 2:40 p.m., reconvened in Courtroom A
23 as follows.)

24 THE CLERK: What I'm going to do now is seat you in
25 the jury box, these are the seats you will maintain throughout

1 the course of this trial. The first juror who will remain in
2 seat number one is Jeanne H. Sebald. The second juror will be
3 Timothy Conrad. The third juror will be Harlan E. Wimer. The
4 fourth juror will be Joseph A. Newton. The fifth juror, who
5 will be in the first seat in the second row of the jury box,
6 will be Marcia Waldnauer. Next juror will be Shirley A.
7 Williams. Next will be Gary G. Myers. Next will be Sharon
8 Passmore. Counsel, the jury has been selected.

9 THE COURT: Swear the jury, please.

10 (Whereupon, the Jury was sworn.)

11 THE COURT: Members of the jury, now that you have
12 been sworn, I'm going to give you some preliminary instructions
13 to guide you in your participation in this case. Now, it's
14 going to be your duty to find from the evidence what the facts
15 are. You and you alone will be the judges of the facts. You
16 will then have to apply to those facts the law as I give it to
17 you. You must follow those instructions, whether you agree
18 with them or not. Nothing that I may say or do during the
19 course of this trial should be intended to indicate or should
20 be taken by you as indicating what your verdict should be.

21 Now, the evidence from which you will find the facts

22 will consist of the testimony of witnesses, documents and other
23 things received into the record as exhibits. And any facts
24 that the lawyers agree to or stipulate to or that I may
25 instruct you to find.

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1 Now, certain things are not evidence and must not be
2 considered by you as evidence. I'm going to tell you what
3 those are now. Statements, arguments and questions by lawyers
4 are not evidence. Objections to questions are not evidence.
5 Lawyers have an obligation to their clients to make objections
6 when they believe that evidence is being offered for an
7 improper purpose under the rules of evidence. You should not
8 be influenced by the objection or by my ruling on it. If it's
9 overruled, treat the answer like you would any other. If you
10 are instructed that some item of evidence is received for a
11 limited purpose only, then you must also follow that
12 instruction. Testimony that the court has excluded or told you
13 to disregard is not evidence and must not be considered by you.
14 Anything that you may have seen or heard outside the courtroom
15 is not evidence and must also be disregarded. You are to

16 decide this case only on the evidence presented here in the
17 courtroom.

18 Now, there are two types of evidence which you may
19 consider, direct and circumstantial. Direct evidence is direct
20 proof of a fact, such as the testimony of an eyewitness.
21 Circumstantial evidence, on the other hand, is proof of facts
22 which you may infer or conclude that other facts exist. Now,
23 I'm going to give you further instructions on these, as well as
24 other matters later on in the case. But for present purposes
25 it is sufficient for you to know that both types of evidence

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1 exists and can be considered. Now, it's going to be up to you,
2 of course, to decide which witnesses to believe, which
3 witnesses not to believe and how much credence to give any
4 witness's testimony. I will also give you some guidelines for
5 determining credibility later on in the case.

6 Now, this is a civil case. The plaintiff has the
7 burden of proving her case by what is called the preponderance
8 of the evidence. That means that the plaintiff has to produce
9 evidence which considered in light of all the facts leads you

10 to believe that what the plaintiff claims is more likely true

11 than not. To put it differently, if you were put the

12 plaintiff's and the defendant's evidence on opposite sides of

13 the scales, the plaintiff would have to make the scales tip

14 somewhat on her side. If the plaintiff fails to meet this

15 burden, then the verdict must be for the defendant.

16 Now, those of you who may have sat on a criminal

17 cases will have heard the term proof beyond a reasonable doubt.

18 The requirement does not apply in a civil case and, therefore,

19 you should put that out of your mind.

20 A few quick words about your conduct as jurors.

21 First, I instruct you that during the trial you're not to

22 discuss the case with anyone or permit anyone to discuss it

23 with you. In other words, until you retire to the jury room,

24 you are simply not to talk about the case with anyone.

25 Secondly, don't read or listen to anything touching

1 on this case. And as I told you earlier this morning, if

2 anyone should try to contact you or discuss the case with you,

3 you should advise one of the court's attendants. Don't try to

4 do any independent research or do any outside investigation

5 about the case on your own.

6 And finally, and very importantly, do not form any
7 fixed opinion about this case until you have an opportunity to
8 start the deliberations at the end of the case.

9 Now, I see that there is a lady at the end here who
10 has a note pad, that's fine. My only point is if you wish to
11 take notes in this case, I'm going to permit you to do so, it's
12 totally up to you. I notice a number of you are at a serious
13 disadvantage, you don't have a pen, you don't have a pad. I'm
14 going to see to it that you all get one and we'll see to that
15 after the opening statements.

16 Now, the trial is going to begin. And this is the
17 way it goes. First each side may make an opening statement.
18 An opening statement is neither evidence nor argument. It's
19 simply an outline of what that party intends to prove offered
20 to help you follow the evidence in advance. Next, the
21 plaintiff will call her witnesses and the defendant may
22 cross-examine them. Then the defendant will present their
23 witnesses, and the plaintiff may cross-examine them. After
24 that the attorneys will make what is called closing arguments
25 to you to summarize and interpret the evidence for you. And

1 the court will then give you instructions on the law. And at
2 that point you will retire to begin deliberating on your
3 verdict.

4 Before we begin with the openings, let me see
5 counsel at over here at side bar for just a second.

6 (At side bar on the record.)

7 THE COURT: Just as a housekeeping matter, I am
8 functioning, due to his illness, without a Deputy Clerk right
9 now. I want each of you to keep track, keep a list of your own
10 exhibits. Admitted or rejected. Do you have exhibit books or
11 anything along those lines?

12 MR. MATESIC: We exchanged them already.

13 MR. PAWK: I have one for the court.

14 THE COURT: That way we have a compilation to go out
15 with the jury once we decide what is or is not admitted. The
16 other thing I want each of you to keep track of, so it can be
17 subsequently transposed on to a trial sheet, is the list of
18 witnesses. So, basically, in that sense you'll be doing
19 ministerial clerk work.

20 (End of discussion at side bar.)

21 THE COURT: All right, Mr. Matesic, are you ready to
22 go?

23 MR. MATESIC: Yes, your Honor. Good afternoon,
24 ladies and gentlemen. They say a picture is worth a thousand
25 words. What's wrong with this picture. A woman wearing a

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1 hardhat. Compared to the picture of a man wearing a hardhat.
2 Is there anything wrong with the first picture. This case is
3 about whether or not people who are in a position to hire other
4 people think that there's something wrong with the picture of a
5 woman in a hardhat. This case is about fairness. This case is
6 about whether or not an employer should be allowed to use in
7 their decision of whether to hire someone, something for which
8 that applicant is not responsible for. Something which she was
9 born with. Her gender. We concede that in many walks of life
10 women are still under-represented in terms of employment.

11 In this case in particular, the employer, the
12 defendant, Cost Company, is a construction contractor. From
13 our common experiences we know that there some fields of work

14 where women or the numbers of women employees do not equal the
15 numbers of male employees.

16 Well, Congress understands this as well. The United
17 States Department of Labor understands this as well. The
18 government of the Commonwealth of Pennsylvania understands this
19 as well. And that's why there's lawmaking bodies that have
20 passed legislation, have passed regulations, which require any
21 construction contractor who takes public money must give
22 something back. And what they have to give back is their
23 commitment to equal employment under the law.

24 In other words, if you take public money to work on
25 the development of some construction project, you have to show

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1 that you are committed to the goal of employing females equally
2 in the way that you employ males. And so if a female
3 approaches you for a job when you have a vacancy and that
4 female is qualified for that job, you cannot use her gender
5 against her.

6 Now, construction work is seasonal. Meaning that if
7 you are employed for a construction company, you work when

8 there's work. The work is often times dictated by the weather
9 conditions. When it becomes too cold or too wet to work, you
10 don't work any longer. The summertime is the peak time for
11 construction work. That's when the construction industry in
12 Pennsylvania employs its highest number of employees.

13 In the wintertime when things get too cold or too
14 wet, there is no work. For this reason construction work
15 presents a particular hardship. And those who want to work in
16 construction have to deal with this hardship.

17 Kathleen Brown is one such person. She decided
18 eight years ago in 1997 that notwithstanding the fact that
19 construction work is seasonal and presents its own problems,
20 that she wanted to be a construction worker. Up to that point
21 in time she had been a stay at home mom, a freelance artist.
22 But she lived hand to mouth, day to day, she didn't have a
23 steady income.

24 She had a friend who was a heavy equipment operator.
25 This friend let her operate heavy equipment and she saw that

1 she could do it. And she knew that if she became a heavy

2 equipment operator, she could make a lot more money. She could
3 sustain herself, she could sustain her family. And so eight
4 years ago she committed herself to that line of work.

5 In the ensuing eight years, Kathleen Brown has
6 performed a variety of jobs in the construction industry, in
7 the building trades. Today she's a heavy equipment operator.

8 On previous occasions she's been a laborer, she
9 labored for the Commonwealth of Pennsylvania. She's been an
10 oiler. She's been a field technician. These job titles might
11 not mean anything to you now, but certainly by the end of this
12 case you will know what these job titles mean. Because you
13 will hear from Kathleen Brown, she will tell you about all the
14 jobs that she has performed.

15 She will tell you, in particular, that in the summer
16 of 2002, about a mile from where she lived, Cost Company was
17 constructing a state prison in Forest County, also known as SCI
18 Marienville, state correctional institute at Marienville. Cost
19 was the masonry contractor on that site. They weren't the only
20 contractor, but they handled the masonry part of the project.
21 And it was an enormous project. In order to complete that
22 work, Cost was employing over 150 individuals. Bricklayers,

23 laborers and heavy equipment operators. In all 162 employees

24 during the summer of 2002.

25 Kathleen Brown came to be acquainted with several of

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1 those employees. And at the time she was working a job for the

2 state that did not pay very well. It paid her about \$10 an

3 hour, and she had to commute everyday 90 miles. 90 miles to

4 work at a state park to be a laborer at \$10 an hour. One mile

5 from her house Cost Company was putting up an enormous prison.

6 They're paying their laborers \$17 an hour and there is no

7 commute. It was a no brainer.

8 Her friends who were bricklayers came to Kathleen

9 and said, you know, Cost Company is hiring right off the

10 street, we need laborers. It was midsummer of 2002, the

11 construction season was at its peak. You don't need to be

12 qualified, you don't even need to be in the union, you could be

13 hired and then later enroll in the union.

14 Not only did they tell her that Cost was hiring off

15 the street, they had documentation. Once a month Cost Company,

16 in the payroll envelopes that it was handing out to its

17 employees, also attached what's called a minority recruit

18 memorandum. This is the minority recruitment memorandum. This

19 went out with every paycheck to every Cost employee on a

20 monthly basis.

21 This minority recruitment memo said "at this time we

22 may not be accepting employment applications, however, in the

23 future should we be commencing new projects, any additional

24 manpower, please inform us if you know of any individuals who

25 are a minority, who are female, who would be interested in such

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1 a job." You can see at the bottom there is a space for the

2 name of that employee. There's a space with the address of

3 that employee. There's a space where the employee can write

4 down what their previous experience was.

5 One of Kathleen Brown's friends gave her that

6 memorandum blank. She filled it out and sent it in. The peak

7 of construction season, maybe Cost needs employees. They did

8 need employees. But Cost never got back in touch with Kathleen

9 Brown after she first sent in that memo.

10 On July 31st, having not heard from Cost, Kathleen

11 Brown went to the job site personally. At 6:30 in the morning,
12 before the shift even commenced, she was standing outside the
13 Cost trailer waiting for the foreman to show up. Because she
14 knew they were hiring. She waited two hours for that foreman.
15 When that foreman finally showed up, he said what do you want.
16 She showed him that memorandum, she showed that foreman her
17 resume.

18 On her resume she had listed five different jobs
19 that she had performed in the building trades. Operator,
20 laborer, oiler, field technician. The foreman looked at the
21 resume, looked at the memo, looked at Kathleen and said we're
22 not hiring, thank you very much. She turns and walks away.

23 And within the next 30 seconds she hears the foreman
24 addressing two other men, two men who had arrived on the job
25 site after Kathleen. She heard the foreman say to those men

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1 follow me. We're not hiring, follow me.

2 We know that Cost hired somebody, we're pretty sure
3 that they hired somebody on July 31st. We can't be certain,
4 but we have the head of the laborer's union, the union that

5 represented the people that were hired for that job, and his

6 records indicate that in all likelihood on July 31st, Cost did

7 hire somebody. They hired a man.

8 You will learn during the course of this trial that

9 of those 162 employees that I was mentioning a few moments ago,

10 absolutely none of them were female. All of them were male.

11 Kathleen Brown having been snubbed on July 31st, did

12 not stop trying to get work with Cost. She sent them or

13 delivered to them two more versions of that memorandum. Each

14 time filled out with her name and her address. Give me work.

15 Her bricklayer friends kept telling her, Kathleen, they're

16 still hiring people off the street.

17 The days went by, middle August comes, they're still

18 hiring laborers. They're still hiring men, not women. You

19 could say that it's just Kathleen's bad luck. She just wasn't

20 in the right place at the right time. Luck of the draw. Had

21 she shown up at the Cost work site maybe a day later or two

22 weeks later, she would have ended up with a job. This case is

23 about whether or not that's a good excuse.

24 Cost has an obligation under the law to show that it

25 is diligently pursuing a goal of equal employment. Did Cost do

1 that in this case. They had three applications, if you will,
2 they had three documents from Kathleen Brown with her contact
3 information. Please hire me for an opening.

4 Cost did eventually get back in touch with Kathleen
5 Brown. But they didn't get in touch with her in July, they
6 didn't get in touch with her in August when the construction
7 season was at its peak. They waited until mid September.
8 Actually, just after mid September. By then the construction
9 season was winding down.

10 They got in touch with Kathleen Brown and they said
11 we don't have any jobs for you. You're competent to perform
12 the work of an operator or a laborer, but we're not hiring
13 right now.

14 Kathleen Brown was still working for the State of
15 Pennsylvania at that time. She was still earning \$400 a week
16 as a laborer. She was still driving 90 miles everyday. Within
17 a week of that phone call, the State of Pennsylvania would lay
18 her off because the state park where she was working was
19 winding down its season, they had no further need for her.

20 From that point forward Kathleen Brown's life went

21 into a tailspin. She didn't have money. She couldn't afford a
22 place to live. She couldn't afford to keep her car on the
23 road, she couldn't afford to support her child. She was
24 begging people for money, her friends. She had to rely on her
25 friends to give her a place to stay, to buy her food, to buy

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1 her postage stamps. She couldn't have Christmas that year for
2 her child. She couldn't afford to buy a gift. We're not
3 hiring.

4 Luckily for Kathleen the following spring she got a
5 job as an operator with Trumbull Corporation. She began to
6 make enough money to support herself, she began to make enough
7 money to payback the friends who had saved her over the course
8 of the last six months.

9 The picture of a woman in a hardhat. Some employers
10 in this state don't have any problem with that picture.
11 Whether the defendant does is a question for you to decide.
12 Thank you.

13 THE COURT: Mr. Pawk.

14 MR. PAWK: May we approach briefly, your Honor.

15 THE COURT: Yes.

16 (At side bar on the record.)

17 MR. PAWK: Your Honor, I don't like to interrupt
18 counsel's opening or counsel's statement, I would ask for an
19 instruction to the jury. My understanding is that Mr. Matesic
20 does not intend to present any witnesses that told Kathleen
21 Brown that Cost was hiring any of these guys she testified at
22 her deposition that were employees of Cost Company, no longer
23 on the job, no longer are employees of Cost Company, are not
24 listed as witnesses in this case. He basically in his opening
25 statement put out all kinds of hearsay, that it is clearly

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1 objectionable, when Kathleen Brown takes the stand, I don't
2 believe it will be admissible evidence when she does take the
3 stand as to what these men told her because it's clearly
4 offered to prove the truth of the matter asserted.

5 THE COURT: As you were making your opening
6 statement, that occurred to me as well. What is your response
7 to that?

8 MR. MATESIC: This is state of mind evidence, it

9 explains all the conduct the plaintiff undertook to get
10 employment with Cost Construction.

11 THE COURT: This is not the time to give a curative
12 instruction because I don't have any context yet because she
13 hasn't testified. As her testimony comes in, I will rule on
14 whether the state of mind exception exists. If it does, I will
15 give an appropriate limiting instruction.

16 (End of discussion at side bar.)

17 THE COURT: Members of the jury, as you've noticed,
18 we've had a few side bar conferences, we'll try to keep them to
19 a minimum. But really those times that we just engage in pure
20 discussion of law which don't involve you because you're the
21 finders of fact. That's the reason we do those. Are you ready
22 to go, Mr. Pawk?

23 MR. PAWK: I am, your Honor, thank you. May it
24 please the court, counsel, ladies and gentlemen of the jury.
25 My name is Mike Pawk, I represent Cost Company in this case

1 that Kathleen Brown has filed.

2 I would like to introduce you to a few folks in this

3 courtroom that you are going to see around during the course of
4 the trial. My partner, Larry Lutz, who is seated at counsel
5 table with me. And then there are a couple Cost employees that
6 are seated behind us, William Heaton and Dean Taylor, they were
7 foremen on this project.

8 I know it's been a long day and you're probably
9 tired, I'll try to keep my remarks brief. But there are some
10 very important things that I need to say to you at this time.
11 This is my opportunity, one of two opportunities that counsel
12 gets to address the jury directly during the course of this
13 case.

14 We're here because Kathleen Brown claims that Cost
15 Company discriminated against her, that Cost Company didn't
16 hire her for a job, that's why we're here. You need to know a
17 little bit and you're going to hear testimony about Cost
18 Company in this case.

19 But, briefly, Cost Company is a masonry contractor
20 based in Pittsburgh, Pennsylvania. They've been in business
21 for approximately 70 years, started in the 20's by two
22 brothers, Anthony and Charles Cost. Italian immigrants that
23 started a small brick business. Built it overtime and built it

24 and built it and they became successful. They've since passed

25 away. But Anthony's son, Charles Cost, runs the company today.

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1 He is the CEO.

2 They are commercial masonry contractors. They

3 perform mainly commercial work. That's brick work, block work,

4 stone work, restoration work. They're a union contractor.

5 You're going to hear testimony throughout the case as to what

6 that means. Some of you, I know we've had chance to talk to

7 you in voir dire, clearly understand what that is. But for

8 those of you who don't, that means they get their labor supply

9 from the unions. The labor unions, the operating engineer

10 unions and bricklayer unions, as well as pointers, caulkers,

11 cleaners and stonemasons, I believe.

12 They don't just normally hire someone off the

13 street. They have a union agreement. They're a union

14 contractor, they do union jobs and they hire union people.

15 People that the unions supply to them. That's the normal,

16 you'll hear testimony that's the normal course of operation for

17 them.

18 I'll tell you a little later that changed slightly

19 on this job on a few occasions when the labor union was unable
20 to supply a labor job called mason tenders. A mason tender is
21 a person that basically provides all the materials that the
22 bricklayers need to lay the block during the course of the day.
23 The block and mortar, that's what a mason tender supplies to
24 them.

25 Now, you're going to hear testimony throughout this

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1 case that Cost Company is a good contractor, that they don't
2 discriminate. That they have policies and procedures in place
3 to insure that they don't discriminate. That they hire
4 anybody. One of the things they do in negotiating the labor
5 agreements with the unions, they have to agree with the unions
6 that they'll hire anybody. You send them to me, I'll put them
7 to work. You'll hear testimony from Cost employees that that's
8 what they do on the job.

9 Now, the name of this project that's at issue here
10 is called the Marienville prison project. A very large project
11 that started in August of 2001. Cost Company entered into an

12 agreement with the Department of General Services to be the

13 masonry contractor on that project. It was a large site, 180

14 acres.

15 There were many contractors there, not just Cost

16 Company, many contractors. And you heard testimony that

17 Kathleen Brown was very familiar with that site because she

18 worked for another contractor before she came and asked for a

19 job with Cost Company. You'll hear her testify that she worked

20 for a company called Solar Testing Labs. And worked for them

21 for a couple of months in late 2001, November, December of

22 2001.

23 Now, she had never worked for Cost. It's important,

24 you'll hear this testimony, she never worked for Cost before,

25 before this project and she hasn't since. But she was familiar

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1 with the site, as I stated earlier. And you'll hear testimony

2 that her employment terminated with Solar Testing Labs in I

3 think December, 2001. She was unemployed in the spring of

4 2001.

5 She took a job with the State Department of

6 Conservation, I believe, basically performed landscaping work
7 from May, June, July, August of 2002. In fact, she was
8 employed there when she came to the Cost site and asked for a
9 job. She was employed when she sought work from Cost Company.

10 Now, you'll hear testimony, Kathleen Brown will tell
11 you, that she came on the job site on two occasions. She'll
12 say that she came on the job on July 31, 2002, and August 23,
13 2002. You'll hear Cost employees tell you that their peak
14 manpower on this project occurred in July, before she came on
15 the project.

16 Now, did they have a few occasions to hire a spare
17 person here and there after mid July, yes. You'll hear
18 testimony to that. But the total manpower numbers were
19 dropping after mid July into August and September.

20 Cost, as many of you I'm sure are familiar with in
21 building your own home, you've got a time limit to build a
22 building. And Cost was under tremendous time constraints to
23 build this prison. They had a year to do it. They didn't
24 actually get on the job until November, 2001, and they were
25 supposed to be done by November, 2002. So they were moving.

1 And they peaked out with their manpower in July. And when she
2 came on the project in late July, July 31st, that's her
3 testimony, she claims that she asked for a job. She came to
4 the Cost trailer.

5 I'll submit to you that the credible testimony in
6 this case will be that she asked for an operating engineer's
7 job. What's an operating engineer. A person that operates
8 cranes, forklifts, heavy equipment. Which is what her
9 background and training is. You heard counsel tell you she
10 made a decision in 1998 to get certified. In fact, you'll hear
11 her testify that she went through the process to become
12 certified by the Local 66 operating engineers' union to become
13 certified as a heavy equipment operator.

14 And I submit to you that credible testimony will
15 show that that's what she sought when she came on the job. And
16 by that point in the project, Cost witnesses will tell you they
17 had two cranes on the project and five forklifts. They were
18 all being operated by people. By that point in the project
19 they had no openings.

20 I submit to you it wouldn't be fair to fire someone
21 on one of those pieces of equipment just to hire Ms. Brown.

22 And so Cost wasn't about to do that.

23 But you'll also hear testimony that in order to work
24 as an operator engineer on a project of this nature, you must
25 be referred by the operating union, Local 66. Ms. Brown will

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1 even tell you that. She knew that. You can't solicit your own
2 work.

3 So, in other words, if you're an operating engineer,
4 you can't go onto project and say hey, I want to run that
5 crane. You have to go through the union, you have to be called
6 out of the union. I submit to you that -- they didn't have any
7 jobs available as operating engineers when she came on the
8 project, either July 31st or August 23rd.

9 And something else that you didn't hear in
10 plaintiff's opening statement. But Kathleen Brown will tell
11 you that this when she takes the stand. She wasn't certified
12 at that time to be an operating engineer. You have to be
13 certified, she had lost her certification. Cost could not have
14 put her on a piece of equipment in July or August of 2002
15 because she was not in good standing with the union.

16 You'll hear testimony during the course of this case
17 that she did fill out one of those EEO memorandums. What it is
18 that, you'll see it, we couldn't put it on the screen. It's a
19 recruiting memorandum that Cost does. Cost sends these out,
20 these forms out with their employees' paychecks saying, hey, if
21 you know of a minority who wants a job, we may not be hiring
22 right now, it wasn't an application. We may not be hiring
23 right now, but if you know someone, give this to them, have
24 them fill it out and send it to us and we'll contact them. She
25 did that, she filled one out and sent it to Cost Company.

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1 You'll hear clear testimony that Georgia Pawk, the
2 president of Cost and the EEO officer, the equal employment
3 opportunity officer at Cost Company, received that memorandum,
4 which did not have a phone number on it, and wrote her a letter
5 back saying we'd love to have you, I need to have your phone
6 number in order to hire you. And you'll see that document.

7 Plaintiff claims in their opening that Cost never
8 contacted her, just ignored her. That's not true and the
9 evidence is not going to show that.

10 But anyway Cost, you'll hear testimony, that during
11 September, and then into October, and then in November of 2002,
12 Cost was trying to hire her. But when we found out, she had a
13 nice resume as an operating engineer in prior employment, but
14 when they found out she was not certified as an operator, she
15 was not in good standing with the union, they told her you got
16 to become certified, you got to be in good standing with the
17 union or we can't hire you. And she knew that. You'll see her
18 own diary records where she's going about trying to become
19 certified out by the operating union, Local 66 out of Erie.

20 She eventually is successful in becoming recertified
21 by the union. But that isn't until November of 2002. She
22 contacts Cost Company and says I'm now eligible. That's on
23 November 6th. Less than, about a week and a half later, she
24 takes a job with a company called KGL out of Philadelphia.

25 Counsel left that part out of his opening statement.

1 She took a job with another company. She worked in November,
2 she worked in December. Eventually she takes a job, as I
3 stated, in November. Works there November and December with

4 KGL.

5 In December of 2002, about a month and a half after
6 she becomes eligible to actually be hired by Cost as an
7 operating engineer, she files what's called an EEOC complaint
8 against Cost Company, Equal Employment Opportunity Commission
9 discrimination complaint. And Cost addresses it in early of
10 2003.

11 Negotiates with Kathleen Brown. That's when they
12 learn through her complaint that she filed that she wanted a
13 laborer's job. She said I asked for a laborer's job and an
14 operator's job. And I didn't get hired as a laborer.

15 So what does Cost do. In March and April they offer
16 her a laborer's job. They had projects in Greenville, they
17 tried to find her a job as close to her home as they could,
18 Greenville, Erie, they had other jobs in the area. The clear
19 testimony will show that she rejected the laborer's job.

20 So the very job that she complains today to you that
21 she did not receive by Cost Company, they offered to her and
22 she rejected it. And took a job with Trumbull Corporation.
23 And you'll hear her testify about that. She took a job with
24 another company.

25 Now, counsel talked about hiring off the street.

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1 And it is true, you'll hear testimony that because of the
2 location of this project, it's in Marienville and there's not a
3 huge workforce there, there's not a huge labor workforce, on
4 occasion the laborer's union ran out of mason tenders to supply
5 to Cost Company on the project.

6 The normal course, you'll hear, was that Cost would
7 pick up the phone, hey, we need a mason tender over here today.
8 Okay, I'll send one over. On occasion they didn't have
9 somebody, the labor union didn't have someone to send them and
10 Cost did hire a few people off the street and they put them to
11 work.

12 Ladies and gentlemen, it is Kathleen Brown's burden,
13 first of all, I submit to you all the credible evidence will
14 show that she wanted an operating engineer's job. But if you
15 believe she wanted a laborer's job, it's her burden to show
16 you, I don't believe the evidence will show you this, that
17 there was a laborer's job available, and that Cost didn't hire
18 her because she was a woman, and they hired a man. I don't

19 believe that the evidence will show that. And I submit to you

20 that it will not.

21 Now, you're going to hear testimony from a number of

22 people. You'll hear from the plaintiff, Kathleen Brown.

23 You'll hear from Ronald Barrett, who is the business agent for

24 the laborers' union out of Kittanning, Pennsylvania.

25 You'll hear from Georgia Pawk, who is the EEO

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1 officer and president of Cost Company. If that name sounds

2 familiar, she happens to be my wife. That has no bearing on

3 this case. But I did want to mention that to you so you

4 weren't confused. The weight of her testimony is she should

5 have no more weight or no less wait to her testimony, she is a

6 witness like any other witness in this case.

7 Our law firm, Lutz, Pawk and McKay, has represented

8 Cost Company for about 14 years now, and we're based in Butler,

9 Pennsylvania. But I did want you to know, you weren't confused

10 over the name.

11 You'll hear from Dean Taylor, who is a foreman on

12 the Cost project. William Heaton, who's here. You'll hear

13 from Charles Cost, the CEO of Cost Company.

14 The Cost witnesses will tell you that they don't
15 discriminate, they didn't discriminate in this case. They have
16 a detailed equal employment policy at Cost Company that they
17 follow. They have seminars. During voir dire we talked to you
18 about different seminars. Cost has those as well, they go over
19 all these things with their employees. But they don't
20 discriminate in hiring and firing.

21 They'll tell you that when she came on the site,
22 Kathleen Brown always talked about an operator's job. And they
23 didn't have one available and she wasn't certified, wasn't even
24 eligible to be hired as an operator at that time.

25 Now, as Judge McLaughlin instructed you, Kathleen,

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1 as the plaintiff, does have the burden of proof here by the
2 preponderance of evidence. She must show you that Cost failed
3 or refused to hire her based on the fact that she was a woman.
4 If she fails to do that, at the end of the case and fails to
5 meet that burden, I'll be back here and I'll be asking for you
6 to return a verdict for the defendant, Cost Company, against

7 Kathleen Brown.

8 It is important that you keep an open mind
9 throughout this case. Plaintiff gets to go first. And Cost
10 Company gets to present its case. And I ask you to please keep
11 an open mind and listen to all the evidence before you make up
12 your mind. You took an oath to that effect, I'm sure you'll
13 follow it.

14 You are the fact finders in this case. The judge
15 will give you the law. You're going to decide what the
16 evidence is and what the facts are and apply it to the law and
17 render a fair verdict.

18 Nothing magical happens when you enter this
19 courtroom in terms of your life experiences, use your common
20 sense, evaluate the witnesses' testimony. Are they being
21 evasive, are they telling you the truth. Some of you have
22 children. You know in your own life experiences you can tell
23 whether someone is telling you the truth or not. You have to
24 decide the issues of credibility in this case.

25 And finally a trial is an attempt to find the truth.

1 We try to search for the truth in this courtroom during the
2 course of this case. And our legal system, it's easy for
3 someone to make a claim. The courts are open to everybody and
4 it should be that way. And it's a good thing. We have the
5 best legal system in the world. But it's important that you
6 realize that a claim is just a claim, it's not evidence of
7 anything. You have to come into the courtroom and you have to
8 prove your claim. You have to prove it. You have to be
9 satisfied. And if a person fails to prove a claim, then you
10 must find against that individual claimant. And at the end of
11 the case I will be back before you and I'll be asking you to
12 return a verdict in favor of Cost Company. Thank you for your
13 time.

14 THE COURT: Call your first witness.

15 MR. MATESIC: May we have a side bar.

16 THE COURT: Sure.

17 (At side bar on the record.)

18 MR. MATESIC: A few things came up in counsel's
19 opening statement that I'd like to comment on. I quoted
20 counsel telling the jury Ms. Brown's counsel had claimed that
21 Cost never contacted her, which is a mischaracterization of the
22 statements, that Ms. Brown's own counsel did acknowledge there

23 was contact made after the construction season was winding
24 down.

25 Also, we did not attempt to introduce evidence of

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1 the relationship between one of the key witnesses in the case
2 and counsel for the defense. Counsel for Cost did bring that
3 up in his opening statement. And I believe it is unnecessarily
4 injects the highly prejudicial elements into the jury's
5 consideration of this case. Husband defending his wife, which
6 is sure to arouse the emotions of one or more of the jurors.
7 We would request a curative instruction immediately on that.

8 THE COURT: How can I cure that, they're married?

9 MR. MATESIC: I understand, I have to make an
10 objection.

11 THE COURT: Here's the thing, though, then I'll let
12 you go on with the rest of it. I thought there was an
13 agreement in chambers that you were not going to have any
14 problem with the fact they were married. Implicitly,
15 therefore, at least I assumed that that fact would likely be
16 made known in one form or fashion just how it was.

17 MR. MATESIC: Okay, I did not assume -- I thought
18 when we discussed this in chambers, I was being requested, I
19 would not make this an issue during the course of the case.
20 Which I was happy to agree to.

21 THE COURT: To go back and revisit that issue with
22 the jury, I presume you simply would like me to tell them, just
23 as Mr. Pawk told you, the fact they're married, that marital
24 relationship has no relevance, you judge on credibility.

25 MR. MATESIC: I would ask you for a bit stronger, I

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1 don't mean to tell your Honor how to do his job, but I think
2 because this might arouse a reaction from one or more of the
3 jurors --

4 THE COURT: I'll say something appropriate.

5 MR. MATESIC: Thank you. Also, Mr. Pawk was
6 instructing the jurors as to the law regarding the conduct of
7 deliberations, that was before your Honor had the opportunity
8 to instruct them. I don't believe it was appropriate for
9 counsel to do that.

10 THE COURT: What did he say?

11 MR. MATESIC: You have to make a credibility
12 determination, you are the fact finders.

13 THE COURT: That's all true, people say that all the
14 time, I have no problem with that.

15 MR. MATESIC: That's all I have for the record.

16 MR. PAWK: Counsel said that Cost didn't contact
17 her, if I misspoke, I apologize, but it was in the context of
18 after she had sent the EEO memorandum, that Cost didn't contact
19 her. I thought I said it in that context, it was in the fall.
20 Obviously, they had contacts at the trailer, I know that was
21 obvious.

22 THE COURT: Well, tell me again on that point how
23 you think he misspoke?

24 MR. MATESIC: He indicated that counsel for Brown
25 stated that Cost never got back in touch with Ms. Brown or

1 never contacted her. That was a mischaracterization.

2 THE COURT: This is how I'm going to handle it on
3 the question of mischaracterization. My standard rule is I do
4 not tell the jury what they should remember and what they

5 shouldn't. I'm going to simply remind the jury that with
6 respect to opening statements of both of you, to the extent you
7 characterize this or that, it's your recollection that
8 controls. As far as the merits of the marital relationship is
9 concerned, I would say something appropriate that reminds them
10 of -- quite frankly, I think the issue was waived, the record
11 would have to speak to that. So as to avoid any problem down
12 the road, I will address it with the jury.

13 MR. PAWK: Let me just say for the record, judge, he
14 has known of the marital relationship in the case for over two
15 years now. We've talked about it in chambers. We've talked
16 about it before the case. I said I was going to address it in
17 my opening. This is not surprise. I thought I tried to handle
18 it appropriately. I'm a little surprised by how he is
19 characterizing it, that somehow it's prejudicial to his client.
20 It could be bad for me potentially, I don't know.

21 THE COURT: I don't know, either.

22 MR. LUTZ: We also made it clear in chambers that I
23 was here for that purpose, in front of Mr. Matesic.

24 THE COURT: I think that in fairness, you had no
25 objection to the fact that they were married. I don't recall

1 as I sit here today whether you represented on the record that
2 it was your intention to make this known to the jury, perhaps
3 you did.

4 MR. LUTZ: I recall that this morning, your Honor.

5 THE COURT: I'll do this, I'll have my court
6 reporter check his notes to see what the sum and substance of
7 that was. And then at the appropriate point, if I think some
8 additional curative instruction is necessary, I will give it.
9 The only thing I'm going to do right now is I'm going to tell
10 the jury, remind the jury both with respect to openings and any
11 other statements, it's their recollection that controls.

12 MR. MATESIC: Is the document machine working?

13 THE COURT: I'll take a short break and have one of
14 my clerks come over to see if we can get that going. Because
15 it will speed up whatever additional time we have left here
16 this afternoon.

17 MR. MATESIC: Your Honor, one more thing. With
18 regard to her union affiliation with the operator's union, the
19 fact she was taken out of the union, we didn't address this in

20 motions in limine, what your intention is, there's some

21 evidence that she was dropped from the union membership program

22 because of a failed drug test. I don't believe that evidence

23 comes in, I'm not going to raise it.

24 MR. PAWK: What we intend to get into is that she

25 filed an EEOC complaint against the operating engineers' union

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1 and she failed a drug test. I think that goes to bias,

2 interest and improper motive.

3 THE COURT: It's excluded, it's irrelevant and it's

4 prejudicial.

5 MR. PAWK: The fact that --

6 THE COURT: Against another outfit. Why is that

7 relevant to this case -- how was it resolved, by the way?

8 MR. PAWK: I'm not sure how it was resolved, but she

9 testified in her deposition that she filed an EEOC complaint

10 against them within a year, she filed an EEOC complaint against

11 Solar Testing Lab, the same company she worked for.

12 THE COURT: You're introducing it to show?

13 MR. PAWK: An improper motive in the case.

14 MR. LUTZ: Also there are diary entries that are
15 going to be produced in evidence, the day that one of these,
16 I'm not sure which one, one of these other EEOC charges was
17 dropped, she has a note now I'm going after Cost.

18 THE COURT: This is a whole can of worms that I
19 wasn't aware of, I'm not going to resolve this right here --
20 I'll take that up in chambers when we have the opportunity to
21 discuss it more fully.

22 (End of discussion at side bar.)

23 THE COURT: Members of the jury, I'm going to take
24 just a very short break and bring one of my clerks over, who
25 are far more knowledgeable than I am about how the equipment

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1 functions. We'll try to get these screens up, it will speed
2 things up. All right, we're going to take a recess.

3 (Proceedings recessed at 3:38 p.m., in Courtroom A;
4 and reconvened at 3:50 p.m., in Judge's Chambers.)

5 THE COURT: Could you tell me your name and juror
6 number?

7 JUROR NO. 151: Sure my name is Tim Conrad, jury

8 number 151.

9 THE COURT: My law clerk tells me that you mentioned
10 to her on the break that you were a Fed-Ex driver?

11 JUROR NO. 151: I am a Fed-Ex freight driver.

12 THE COURT: That you had delivered to the site that
13 forms this case, the Marienville state prison?

14 JUROR NO. 151: Yes.

15 THE COURT: Would the fact you periodically
16 delivered at that site for any reason in any way effect your
17 ability to be fair and impartial?

18 JUROR NO. 151: No. I just wanted to mention it.

19 THE COURT: I'm glad that you did.

20 JUROR NO. 151: What kind of construction they did,
21 I thought they were like small residential or small commercial.

22 THE COURT: You never got to know any of the
23 principals involved here, you're simply calling it to our
24 attention out of an abundance of caution?

25 JUROR NO. 151: Yes.

1 THE COURT: Does anyone have any questions?

2 MR. LUTZ: No, your Honor.

3 MR. MATESIC: No.

4 MR. PAWK: No, sir.

5 (Juror excused.)

6 THE COURT: There's one other matter that I noticed
7 when I went out and looked at the jury panel. There's a juror,
8 whose number I do not know, her name is Shirley Williams, who
9 is sitting in the back row.

10 MR. MATESIC: She's number five.

11 THE COURT: I know her. My wife and I have known
12 her. Her husband is Dennis Williams, he's an attorney. We do
13 not have and have not ever regularly socialized with them. I
14 know her to say hello to, as with her husband. I don't see
15 that as any problem at all. I'm not going to be talking to her
16 about this case, I assume nobody would object?

17 MR. MATESIC: No objection.

18 MR. PAWK: No objection.

19 (Whereupon, at 3:53 p.m., the proceedings concluded
20 in chambers; and reconvened at 3:55 p.m., in Courtroom A.)

21 THE COURT: All right, Mr. Matesic, call your first
22 witness.

23 MR. MATESIC: Plaintiff calls Kathleen Brown.

24 THE COURT: Ms. Brown, come up here, raise your
25 right hand and I'll swear you in.

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1 KATHLEEN BROWN, PLAINTIFF HEREIN, SWORN

2 DIRECT EXAMINATION

3 BY MR. MATESIC:

4 Q. Good afternoon.

5 A. Good afternoon.

6 Q. Would you state your full name for the record, please?

7 A. Kathleen Brown.

8 Q. Ms. Brown, you are the plaintiff in this case?

9 A. Yes.

10 Q. How old are you?

11 A. I'm 43-years-old.

12 Q. Where do you live?

13 A. My residence is in Marienville, Pennsylvania. But I'm

14 staying down in Orbisonia, Pennsylvania, 05222.

15 Q. How long have you lived in Marienville?

16 A. Well, again, three years.

17 Q. What do you do for a living?

18 A. Right now I'm with the operating engineers.

19 Q. What is an operating engineer?

20 A. I operate heavy equipment.

21 Q. The operating engineers, that's a union?

22 A. Correct.

23 Q. How long have you been a member of that union?

24 A. Eight years total.

25 Q. That's eight continuous years?

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1 A. No, I have a break in service.

2 Q. From when till when?

3 A. 2000 to 2002.

4 Q. Okay. I want to get back to your work as an operating

5 engineer, just a few more questions about your background;

6 how far did you go in school?

7 A. 11th grade.

8 Q. Do you have a GED?

9 A. Yes, I do.

10 Q. Do you have any family?

11 A. Yes, I have two sons.

12 Q. And is one of them accompanying you today?

13 A. Yes, that's my son, Eric, Eric Burtop.

14 Q. How old is Eric?

15 A. He's 12.

16 Q. And your other son?

17 A. Steven Meholick.

18 Q. How old is Steven?

19 A. He's 20.

20 Q. Okay, back to operating engineer, you said you operate

21 heavy equipment?

22 A. Correct.

23 Q. What do you mean when you say heavy equipment?

24 A. Tractors, dozers, loaders. Forklifts, cranes. I don't

25 particularly operate everything, but if I have the opportunity,

70

1 I would like to. But I'm only certified in certain things.

2 Q. How did you learn the skills necessary to operate those

3 various pieces of heavy equipment?

4 A. I entered an apprenticeship.

5 Q. When did you do that?

6 A. In 1997.

7 Q. And who was holding the apprenticeship?

8 A. It was the operating engineers.

9 Q. What had you done prior to 1997?

10 A. I was a stay at home mom, I raised my two children. They

11 were both with me at that point. I had a studio in my

12 basement, I was a freelance artist.

13 Q. And why did you decide to pursue work in the construction

14 trades?

15 A. Well, it was up and down, you know, I'd get a little

16 ahead, then I'd fall behind. I was on and off welfare

17 periodically. I'd pick up a bartending job here and there.

18 I just wanted a better living for myself and my children.

19 Q. So this is going back to 1997?

20 A. Yes.

21 Q. Were you married at the time?

22 A. No, I was single.

23 Q. And tell us about the apprenticeship program, what all

24 does that entail?

25 A. It's 4,000 hour, four-year program. And you have to

1 qualify in for a Class A or Class One piece of equipment to

2 become a journeyman.

3 Q. What is a Class One piece of equipment, what does that

4 term mean?

5 A. It would be whether you're like a tractor, a crane, a

6 dozer, a loader -- there's a lot of them are Class One.

7 Q. Did you complete the 4,000 hours?

8 A. No, I didn't.

9 Q. How far along did you go?

10 A. I had 2.5 hours or 2.5 years I mean.

11 Q. Do you know how many hours that was?

12 A. No, I'd have to --

13 Q. Despite the fact that you didn't complete the

14 apprenticeship program, though, you're working as an operator?

15 A. Yes, I'm journeyman.

16 Q. So you don't need to have completed the apprenticeship

17 program in order to be an operator?

18 A. No, I don't.

19 Q. What do you like in particular about construction work?

20 A. Well, I like working outside, I like the money. I like

21 the insurance and the security it gives me. I mean, I need it,

22 retirement, health benefits. If I work good. If I get to

23 work.

24 Q. Anything else in particular that you prefer about

25 construction versus what you did before?

72

1 A. Well --

2 Q. Let me ask it this way. What projects have you worked on

3 that we might know about, those of us who live in western

4 Pennsylvania?

5 A. I worked on 522 last year. I-99 was the year before

6 that. When I worked in the building trades, I worked at the

7 indoor and outdoor track and field at Penn State. I like to

8 drive by it, I have my kids with me and tell them I helped

9 build it. I didn't build it myself, but I was there.

10 Q. In addition to being an operator, you performed other

11 jobs in the building trades?

12 A. Yes.

13 Q. Tell us about those?

14 A. I was a field technician.

15 Q. What does a field technician do?

16 A. Well, I was hired mainly because of my construction

17 background. But I watched the material go in at the SCI

18 project. And I made a daily report up, what material was used,

19 where it was placed, where it came from, where it went.

20 Whether it was stable, unstable, that kind of thing.

21 Q. Okay. What else have you done in the building trades?

22 A. I was an oiler.

23 Q. What does an oiler do?

24 A. Well, I oiled on a crane, which I basically was the

25 operator's safety man, that's a big part of it. Make sure all

73

1 the equipment is running right, all the cables are good. Make

2 sure no one gets hurt by him or he doesn't hurt or swing into a

3 power line. He's the operator, I'm just like the second man.

4 Q. I neglected to ask you, you were a field technician for

5 how long?

6 A. Two months.

7 Q. And how long were you an oiler?

8 A. I was an oiler for about two years.

9 Q. Is that two continuous years or 24 months continuously or

10 sporadically?

11 A. No, there was breaks. There were different jobs. I

12 oiled on a sheer, which cut metal in a demo, which cut I-beams,

13 to take off the site. I did that for almost seven months. And

14 then I oiled on various cranes.

15 Q. But if we added up the total number of months that you

16 worked as an oiler, would that be 24 months?

17 A. Yeah, easy.

18 Q. Any other jobs you've worked in construction trades?

19 A. I drove a truck, truck driver. I've operated compactors.

20 I'm forklift certified. Now you have have to have a

21 certification for a forklift. I achieved that through the

22 operator engineers.

23 Q. Okay. And you heard the reference during the opening

24 statements to your work with the State of Pennsylvania as a

25 laborer?

1 A. Yes.

2 Q. Would you describe that, please?

3 A. Yes. I worked for the State of Pennsylvania as a laborer

4 in '02, I started in May. It was for the parks services.

5 Pendigo was the main park, but I worked at Kinzua and Elk. And

6 my job was to maintain those facilities, their equipment. One

7 facility had a pool, we had to maintain it. With all the

8 filters and everything that goes along with that. At Kinzua we

9 brushed and cleaned out underneath the bridge. And then we

10 replaced planks on the bridge, that was like 301 feet off the

11 ground, we replaced them, pulled the old ones out and put a new

12 one in. At Elk they had a dam, so we had to put in and take

13 out the docks for them for launching boats. When the water

14 went down, we would take them out. And then restore them in

15 the fall at the end of the season.

16 Q. I believe you heard counsel refer to your work with the

17 state as landscaping work. Based on your experience, eight

18 years in the building trades, does this qualify as strictly

19 landscaping work?

20 A. No.

21 Q. But is landscaping included in that?

22 A. Yes, I mowed grass. But I also used wheelbarrows. Used

23 drill shovels, I mean, we dug ditches. We didn't just weed and

24 mow.

25 Q. I asked you what you liked about construction work in

75

1 general; can you tell the jury in general were there any

2 problems or hardships or particular things about construction

3 work that you don't prefer?

4 A. The weather, it doesn't cooperate very well. And it's a

5 short season in Pennsylvania.

6 Q. And what is the problem if the weather doesn't cooperate?

7 A. Well, like the last couple years, I worked heavy highway.

8 So that's moving earth, I moved a lot of dirt. And if it's

9 raining a lot, if it's raining previously and the earth is

10 saturated, the material, we can't move it or place it. And if

11 you can't move it or place it, it's like I run a compactor this

12 year, I ran a truck last year, so you're not going to move it,

13 you're not going to work, they're going to tell you to go home.

14 Q. Do you get paid if you don't work?

15 A. You get a one hour show-up time, sometimes. They might

16 call you and tell you not to even bother to come. But usually

17 you get at least an hour show-up time, but no, you don't get

18 paid for anything.

19 Q. In terms of safety, has that ever been a concern of yours

20 on the job?

21 A. Yes, I'm very safety conscious. I mean my motto is I go

22 home safe and everybody I work with goes home safe. They have

23 families, they have a two-hour drive, whatever, so I take my

24 time, I make sure that my equipment that I run or whatever I'm

25 doing, I'm doing it safely.

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1 Q. Okay. I want to take you up to, well, actually back to

2 the year 2002, a little bit forward in your work history. You

3 were working for the Commonwealth of Pennsylvania; when did you

4 get that job?

5 A. I got it in May of '02.

6 Q. And the job title was?

7 A. Laborer.

8 Q. And how much did you earn at that job?

9 A. I made \$9.50, I think it started out at a rate of \$9.50.

10 And after I got on the job, I was wasn't familiar with working

11 with the state or anything like that, they told me that if I

12 took the Civil Service test, I could upgrade. So I went and

13 took the Civil Service test and passed it, and became a skilled

14 laborer and my rate went to \$10.50.

15 Q. When did that happen?

16 A. Probably about a month or two into May, June or July,

17 it's in my diary, I think.

18 Q. How many hours a week were you working for the state?

19 A. 39.5.

20 Q. And did you get any other perks with the state, such as

21 pension benefits or any retirement?

22 A. No, that's why they kept you under 40 hours. And I was

23 temporary. When they hired me, it was a temporary job. It was

24 a temporary job, they told me that right from the beginning.

25 Q. Where was that job located?

77

1 A. Bendigo, in Johnsonburg.

2 Q. How far is that from Marienville -- pardon me, where were

3 you living at that time?

4 A. Marienville.

5 Q. How far was Bendigo from Marienville?

6 A. It was 45 plus miles one way.

7 Q. So a 90-mile round trip commute?

8 A. Yes.

9 Q. Because you weren't staying in Bendigo, you were staying

10 at Marienville?

11 A. Correct.

12 Q. Were you being reimbursed for your travel?

13 A. No.

14 Q. I'm going to round off \$9.50, \$10.50, I'm going to say,

15 just for the sake of argument, you were making about \$10 an

16 your, you were working about 40 hours a week. So give or take

17 a few dollars, you were making about \$400 a week, is that fair

18 to say?

19 A. Correct.

20 Q. You were working five days a week for the state?

21 A. They averaged out that I would not work anymore than 40

22 hours.

23 Q. But in any given seven-day period, you were working on

24 average of five days?

25 A. Yes.

1 Q. You were making five round-trip commutes each week?

2 A. Yes.

3 Q. So 450 miles?

4 A. Yes.

5 Q. Was that enough, the money that you were being paid by

6 the state, was that enough for you to live on?

7 A. No. I was really having a hard time taking care of, I

8 had a house on the river, meanwhile, before I made a permanent

9 residence in Marienville, I was 10 more miles away from

10 Marienville. My friend, Mandy -- just told me, basically, to

11 bail on the house because I couldn't afford it. I couldn't

12 afford driving 90 miles round trip, paying the rent, paying the

13 utilities. My oldest son was with me then on the river. I

14 just couldn't swing it, I was killing myself.

15 Q. Did you own that home?

16 A. No, I rented it.

17 Q. At some point in the year 2002, you learned that there

18 might be some vacancies at the -- strike that question.

19 You did at some point apply for work with Cost Company?

20 A. Yes.

21 Q. How did you come to know there was or there may have been

22 a vacancy at Cost?

23 A. Well, there's three bars in Marienville, one is the Kelly

24 Hotel. And I frequented it because my best friend is the

25 manager there. And she was the first one that pretty much

79

1 mentioned it --

2 MR. PAWK: Objection, hearsay.

3 MR. MATESIC: Goes to state of mind, your Honor.

4 THE COURT: All right. As to why she did something?

5 MR. MATESIC: Yes.

6 THE COURT: I'm going to overrule it and I'm going

7 to give the jury a curative instruction now. Members of the

8 jury, although the witness hardly had much of an opportunity to

9 answer the question. I believe, based upon a discussion we had

10 at side bar, there's going to be testimony to the effect that

11 one or more persons -- tell me if I have this right, informed

12 her that Cost was hiring, is that correct?

13 MR. MATESIC: Yes.

14 THE COURT: All right. And then it's a result of

15 that she took certain action. I instruct you that when you

16 hear that testimony, you may not hear it and consider it for
17 the proposition that Cost was in fact hiring, because that is
18 hearsay. The only reason this testimony is coming in is why
19 she then did something in response, do you understand what I'm
20 saying. So, once again, remember you have to listen to what I
21 tell you insofar as the law is concerned. You may not
22 substantively consider the testimony. It is only being offered
23 as to why she did thus and so. Go ahead with your line of
24 questioning.

25 MR. MATESIC: Thank you, your Honor.

80

1 BY MR. MATESIC:

2 Q. Go ahead.

3 A. Okay. My best friend is Mandy Rogers, Mandy was the
4 manager of the Kelly Hotel. So I frequented that bar and she
5 worked there, she's in there all the time. Well, she, you
6 know, told me that they were hiring guys off the street in
7 Marienville. She knew that, because she's a resident of
8 Marienville all of her life, she's lived there all her life.
9 She told me, you know, so and so got hired, I didn't know these

10 people because I'm not from there, you know. And then I talked

11 to the bricklayers, and they're telling me that they were

12 putting recruiting forms in their paychecks.

13 Q. How did you come across these bricklayers, how did your

14 path and theirs happen to cross one another?

15 A. Started on a social level. But, you know, get to

16 talking, they asked me what I did and you know I told them I

17 worked for the state, I used to be an operator, worked

18 construction. So kind of build a -- get to know each other,

19 your friends.

20 Q. Now, you were mentioning forms that were going out in the

21 bricklayers' paychecks?

22 A. Yeah, they were recruitment forms.

23 Q. I'm going to place on the document camera here what's

24 previously been labeled as Plaintiff's Exhibit 24; do you see

25 that on your screen?

1 A. Yes.

2 Q. Is this the recruitment form that you were talking about

3 before?

4 A. Yes.

5 Q. Couple things here. In addition to the printed text,

6 there is also some handwritten language on this exhibit, and

7 I'd like you, if you can please, to identify whose handwriting

8 we're looking at here. First of all, at the bottom,

9 individual's name, present address?

10 A. That's my handwriting, that's my name and that's my

11 address at the time.

12 Q. Where did you get this?

13 A. I received this from one of the bricklayers, probably

14 when I was in the Kelly they handed it to me. I told them to

15 give me one of these recruitment forms, I didn't see one, so

16 they gave me one.

17 Q. Do you remember the name of the bricklayer?

18 A. It was probably Pete Hartford, something like that, yeah.

19 Q. Who did he work for?

20 A. He worked for Cost.

21 Q. And did he -- well, strike that. What did you do with

22 this document after you got it?

23 A. I filled it out.

24 Q. And then what did you do?

25 A. He wrote the address on the top of this form and that's

1 where I mailed it.

2 Q. And when you say he wrote the address, where my finger's
3 indicating right now Cost?

4 A. Correct.

5 Q. When you got this document, did it have any address on it
6 for Cost?

7 A. No.

8 Q. If he had not filled this out, would you have known where
9 to send it?

10 A. No.

11 Q. So you say you mailed it to Cost?

12 A. Correct.

13 Q. Do you remember when that was?

14 A. I'd say it was shortly after this date because as soon as
15 I got it, you know, I was anxious to get some work.

16 Q. Did you have any idea how much money you would earn had
17 you in fact been hired by Cost?

18 A. I know I would make a lot more than what I was making.

19 Q. How would you know that?

20 A. Because I worked union work, I know that union laborers,
21 any union, whether it be a carpenter, a laborer, would be
22 making more than \$10.41 an hour.

23 Q. Did you get any response from Cost after you mailed this?

24 A. I didn't hear anything.

25 Q. What did you do next?

83

1 A. I waited a couple weeks, then I went up to the site.

2 Q. By the site, you're referring to the SCI Marienville
3 site?

4 A. Correct.

5 Q. How far was that from your home?

6 A. Well, by this time I was moving into Mandy's house. On a
7 porch that she let me move in on. And it was a mile away. One
8 mile away from her door.

9 Q. And do you remember when it was that you went to the site
10 for the first time -- strike that. You had testified earlier
11 that you were a field technician?

12 A. Correct.

13 Q. When were you a field technician?

14 A. I was a field technician in November, December of '01.

15 Q. Where were you a field technician?

16 A. At the SCI project.

17 Q. So you were familiar with where that project was located?

18 A. Yes.

19 Q. You were familiar with how that project was arranged, how

20 it was laid out?

21 A. Yes.

22 Q. Let's go back to the earlier line of questioning. You

23 went up to the SCI site when?

24 A. July 31st was the first time I stepped on the site to

25 request employment from Cost.

84

1 Q. And did you speak to anybody from Cost at that time?

2 A. Yes, I did, I went to the trailer, I talked to Dean

3 Taylor.

4 Q. When you got to the trailer, was he there?

5 A. No, he wasn't there.

6 Q. Did you have to wait for Mr. Taylor?

7 A. Yes, I did.

8 Q. How long did you wait?

9 A. Well, I got there at 6:30 early because I've been on jobs

10 before, I wanted to catch him before he went out on the site.

11 Well, I didn't catch him, I missed him. I don't know what

12 gentleman I talked to inside, I'm assuming one of the workers,

13 said that he was out on site, that he would be back, just to

14 hang out. Because I told him what I wanted, he said just hang

15 out, he'll be back.

16 Q. How were you dressed that day?

17 A. I was dressed in blue jeans, boots and T-shirt.

18 Q. Why were you dressed that way?

19 A. Because I was hoping to go to work.

20 Q. Did you have any documents with you when you went to the

21 Cost job site on July 31st?

22 A. Yes, I did, I had one of these memorandums, I guess you

23 would call it, and a resume.

24 Q. Now, I'm going to place before you what's been previously

25 labeled as Plaintiff's Exhibit 12 -- can you identify this

1 document, Ms. Brown?

2 A. Yes, it's my resume.

3 Q. And is this the resume that you took with you on July 31,
4 2002?

5 A. Yes.

6 Q. And the jobs that you identify as having worked on this
7 resume, I'll just read them, you can follow along. Laborer,
8 May, 2002 to August, 2002?

9 A. Right.

10 Q. Those are correct, that's the correct time period for
11 this job as a laborer with the state?

12 A. Yes.

13 Q. Field technician, October, 2001 to December, 2001?

14 A. Yes.

15 Q. Heavy equipment operator, April, 2000 to May, 2000, do
16 you see that?

17 A. Yes.

18 Q. Oiler for shear/rock truck driver, May, 1999 to November,
19 1999?

20 A. Yes.

21 Q. Oiler, February, 1999 to April, 1999?

22 A. Yes.

23 Q. Oiler, September, 1998 to -- I don't have the actual date

24 on there, it's for Century Steel Erectors?

25 A. Correct, that's mine.

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1 Q. This is the exact copy of the resume you took with you to

2 the Cost work site on July 31st?

3 A. Well, if you flip back to the front page -- if you look

4 at this one, the front page, where the laborer conservation, I

5 already have August of 2002. So this had to be like the

6 second, this was the one I made up second. The only difference

7 being is that laborer wasn't on there.

8 Q. I see. You did in fact talk with Mr. Taylor on July 31,

9 2002?

10 A. Yes.

11 Q. Tell us about that discussion, how long did it last?

12 A. Not very long. When he did finally show up, he shook my

13 hand, I told him what I wanted, work. He said what can you do.

14 I barely got out, you know, operating, I just wanted to explain

15 to him that I do have a construction background. And he really

16 didn't give me time to explain anything. He said we're not

17 hiring operators. I said, well, all right, I'll do anything,

18 whatever you're looking for. And he said, well, we're not

19 hiring, we're not hiring period. So I left, that was it.

20 Q. Were you the only person who was waiting for Dean Taylor

21 that morning?

22 A. No.

23 Q. Who else was waiting for him?

24 A. There were two other gentlemen that showed up probably --

25 I'd say close to an hour after I showed up. I was there at

87

1 6:30 and I didn't see Dean until 8:00, 8:30, that morning.

2 Q. All right. Of those three people, who was the first one

3 to talk with Dean Taylor?

4 A. Myself.

5 Q. Mr. Taylor told you that Cost was not hiring?

6 A. Yes.

7 Q. And you did what after that?

8 A. I left.

9 Q. Did you hear any other -- strike that question. Have you

10 ever met Dean Taylor since that day, have you ever had occasion

11 to talk to him?

12 A. I've met him one other time, August -- late in August,
13 August 23rd.

14 THE COURT: What year?

15 THE WITNESS: 2002.

16 BY MR. MATESIC:

17 Q. Let me go back to the two gentlemen that were waiting for
18 you; how were they dressed?

19 A. One gentleman that had talked to me, he was in street
20 clothes. The other one, he showed up even later than the first
21 guy.

22 Q. What do you consider street clothes?

23 A. He had sneakers on, he had jeans on, he had like a -- not
24 a dress shirt, but a street shirt.

25 Q. Street shirt or street clothes, as opposed to?

88

1 A. Showing up in a dirty, not a dirty T-shirt, a stained
2 T-shirt, worn jeans and a pair of boots.

3 Q. Let me put it this way. If you were dressed that way,
4 would you be dressed appropriately for construction work?

5 A. No.

6 Q. Did you hear Dean Taylor say anything to these two men?

7 A. After I spoke with Dean, it was pretty short and I

8 started down the steps, I was probably 15, 20 feet, and we were

9 between trailers, I was 15, 20 feet away, my car was facing the

10 trailers that I had just exited, and I heard him say what do

11 you want --

12 Q. Let me stop you there, I don't want you to tell me what

13 either of those two other men said, I just want to know what

14 Dean Taylor said?

15 A. He said --

16 Q. You heard him say what do you want?

17 A. What do you want.

18 Q. Did you hear him say anything else?

19 A. Come with me or follow me. Come with me.

20 Q. And he was speaking to who?

21 A. Those two guys.

22 Q. Did you see Dean Taylor after that?

23 A. I saw them, by the time I heard him and I got to the car

24 and turned around and I was getting in my car facing the

25 trailers, he was walking up towards the drug trailers, or the

1 drug trailer, testing.

2 Q. What did you conclude based on what you saw?

3 MR. PAWK: Objection, your Honor, calls for
4 speculation.

5 THE COURT: Sustained, calls for speculation.

6 BY MR. MATESIC:

7 Q. You said you visited the site on a second occasion?

8 A. Yes.

9 Q. August 23rd?

10 A. Yes.

11 Q. Tell us about that?

12 A. I showed up and Dean and Bill Heaton were there. I
13 didn't know who Bill Heaton was, but one of the construction
14 workers told me, he described him to me. I says I don't know
15 who Bill Heaton is and they said, well, he's about as tall as
16 he is round and has a beard.

17 Q. And why would you want to be talking to Bill Heaton?

18 A. Because I didn't get anywhere with Dean Taylor.

19 Q. Did you talk with Bill Heaton that day?

20 A. Yeah, he was there.

21 Q. Tell us about the conversation, what was said?

22 A. It was pretty short, I shook his hand. I told him I

23 wanted work. They didn't give me much, let me explain, you

24 know, that I was a laborer. He said what do you do. I said

25 well, I operate. I just wanted to explain that's where I had

90

1 my most experience, was in operating, and I was on site. They

2 never gave me the time. Anyway, he said about laboring. And I

3 said your laborers run walls, I know how to run a wall. He

4 said well, we're not hiring. So I turned around and I left

5 again.

6 Q. Did you have any documents with you at that time?

7 A. Yes, I gave him -- I at least had a resume on me. I'm

8 pretty sure I had a recruitment form, too.

9 Q. Did you ever hear back from Cost after that second visit?

10 A. I never heard anything till September.

11 Q. Tell us about that?

12 A. One of the recruitment memorandums, whatever you want to

13 call it, I mailed in. Apparently it got to somebody, you know.

14 Because I made attempts. But anyway this one got to somebody.

15 And they mailed it back to me and it said, they gave me a phone
16 number and told me to call.

17 Q. Where did they mail it to?

18 A. They mailed it to the 98 or the address on the form. I
19 think it's Sigel?

20 Q. RR 1?

21 A. 98-C, River Road, Sigel, PA.

22 THE COURT: Members of the jury, how many of you are
23 from out of the county?

24 (Juror indicates.)

25 THE COURT: Traveling some distance?

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1 A JUROR: About an hour and a half.

2 THE COURT: Mr. Matesic, if that clock is anywhere
3 near accurate, I can't guarantee it the way mechanical things
4 have been running in this building lately, but close enough to
5 4:30 that we're going to take a break. Let me remind you of
6 what I told you earlier, and that is don't talk about the case
7 with anybody. My law clerk, when we break, is going to take
8 you back to the jury room, show you how to get in in the

9 morning, and answer any other additional questions you may
10 have. We're going to start tomorrow at 9:00 a.m. So we're in
11 recess until then.

12

13 (Whereupon, at 4:28 p.m., the Jury Trial proceedings
14 were adjourned for the day.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter

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11 _____

12 Ronald J. Bench

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